Supreme Court, U. S.
FILED
AUG 21 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-297

NATHAN PORTNER,

Petitioner,

—Against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HOWARD FRANKLIN CERNY
Attorney for Petitioner
345 Park Avenue
New York, New York 10022
(212) 688-0700

HOWARD F. CERNY
JOHN J. MEGLIO
RICHARD SILVER
of Counsel

August 21, 1972

INDEX

PAGE

Opinions Below 1

Jurisdiction 1

Questions Presented 2

Statutory Provisions Involved 4

Statement of the Case 6

REASONS FOR GRANTING THE WRIT—

1. The Liberal Interpretation of the Federal Conspiracy Statute, 18 U.S.C. 371, by the Trial and Appellate Courts Below, Deprives Petitioner of Due Process by Preventing Him the Right to Raise the Defense of Statute of Limitations under 18 U.S.C. 3282 12

2. Assuming Arguendo Petitioner Was Properly Charged With Misapplication of Bank Funds in Violation of 18 U.S.C. 656, and Assuming Further This Charge Was Not Barred by the Prosecutor's Concession, Then the Violation of the Statute Occurs at the Moment the Assets Are Unlawfully Appropriated and the Statute of Limitations Would Commence to Run From That Moment 14

3. The Court Below Erred in That It Failed to Apply the Doctrine in *Toussie* v. *United States* and Hold That the Misapplication of Bank Moneys Under 18 U.S.C. 656 Was Not a Continuing Offense and Therefore, the Charge of Misapplication Was Barred by the Statute of Limitations Inasmuch as the Statute Commenced Running From the Date of the Last Act of Misappropriation in November, 1959 15

PAGE

4. There Is a real Conflict Between the Decision Below and the Decision in *Grunewald* v. *United States* in That the Court Below Erred in Not Holding That *Grunewald* Was Controlling 17

5. Petitioner Was Erroneously Convicted of Falsifying Bank Records in Violation of 18 U.S.C. 1005 in That He Was Not Even Charged With Any Overt Acts of Making False Entries and There Was No Evidence At All That He Made Such Entries 20

6. If the Conspiracy Was Not Over at the Time of the Last Act of Misapplication of Bank Moneys in November, 1959, Insofar as Petitioner Is Concerned, Then He Withdrew From the Conspiracy When He Was Incarcerated in 1961, When He Wrote Letters to the Bank Itself and the State Banking Commission Requesting Copies of His Company's Bank Statements and When He No Longer Had Contact or Transactions With the Bank and Its Employees 21

7. This Court Should Exercise Its Supervisory Powers Over the Lower Federal Courts in This Case 22

8. The Interpretation of the Federal Conspiracy Statute, 18 U.S.C. 371, Is Sufficiently Important to Warrant Review of the Opinion and Judgment Below 26

9. The Decisions Below Are So Totally Devoid of Evidentiary Support so as to Render Them Unconstitutional Under the Due Process Clause of the Fourteenth Amendment 27

PAGE

CONCLUSION 27

Certificate of Service 28

APPENDIX A—

1959 State of New York Indictment 1a

APPENDIX B—

1961 Federal Indictment 2a

APPENDIX C—

1970 Federal Indictment 10a

APPENDIX D—

Findings of Facts and Conclusions of Law from the United States District Court for the Southern District of New York (1971) 16a

APPENDIX E—

Judgment of the United States District Court for the Southern District of New York 19a

APPENDIX F—

Opinion of the United States Court of Appeals for the Second Circuit (1972) 21a

APPENDIX G—

Judgment of the United States Court of Appeals for the Second Circuit 28a

APPENDIX H—

Order from Supreme Court of the United States extending time to file Petition for Writ of Certiorari 30a

Table of Authorities

Cases: PAGE

Garrett v. United States, 396 F.2d 489 15
Grunewald v. United States, 353 U.S. 371 .....2, 9, 17, 19
Hoag v. State of New Jersey, 356 U.S. 464 .....24, 25
McCandless v. Furland, 296 U.S. 140 17
McNabb v. United States, 318 U.S. 332 25
Marshall v. United States, 360 U.S. 310 26
People v. Portner, 19 A.D. 2d 620 10
Schlude v. Commissioner, 372 U.S. 128 17
Thompson v. City of Louisville, 362 U.S. 199 27
Toussie v. United States, 397 U.S. 114 .....2, 12, 13, 15
United States v. Borelli, 336 F.2d 376 22
United States v. Falcone, 109 F.2d 579, aff'd 311 U.S. 205 20
United States v. Fortunato, 402 F.2d 79 15
United States v. Hickey, 360 F.2d 127 18
Upshow v. United States, 335 U.S. 410 17
Wilkinson v. United States, 365 U.S. 399 17

Statutes:

18 United States Code 371 .....2, 4, 6, 8, 10, 12, 14, 26
18 United States Code 656 .....2, 5, 6, 8, 10, 13, 14
18 United States Code 1005 .....3, 5, 6, 8, 10
18 United States Code 3282 .....2, 4, 5, 8, 12, 26
28 United States Code 1254(1) 1, 5
14th Amendment to the United States Constitution 27

In the

Supreme Court of the United States

October Term, 1972

No. ——

Nathan Portner,

Petitioner,

—Against—

United States of America,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Nathan Portner, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 22, 1972.

Opinions Below

The opinion of the Court of Appeals, not yet reported, and the judgment appear in the Appendix hereto. No opinion was rendered by the United States District Court for the Southern District of New York; however, the Findings of Fact and Conclusions of Law of said Court along with the judgment also appear in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on June 22, 1972. The time to file this

petition was extended from July 22, 1972 to August 21, 1972 by order of Mr. Justice Burger, dated July 26, 1972 (Appendix H). This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. Whether the courts below erred in failing to find that prosecutor's concession that statute of limitations barred at least one charge, also barred other charges which related back to the charge that was admittedly barred?

2. Whether the courts below erred in failing to interpret the conspiracy statute (18 U.S.C. 371) so as to find that the substantive crime was completed at the time of the last act of misapplication in violation of 18 U.S.C. 656 in November, 1959, so as to allow the commencement of the running of the statute of limitations (18 U.S.C. 3282); and whether the interpretation of this statute is sufficiently important to warrant review?

3. Whether the courts below erred in failing to apply the doctrine in *Toussie* v. *United States* and hold that misapplication of bank moneys in violation of 18 U.S.C. 656 was not a continuing offense and therefore the statute of limitations commenced running on the date of the last act of misapplication in November, 1959?

4. Whether the courts below erred when they failed to apply the doctrine of *Grunewald* v. *United States* as controlling in this case and thereby reverse the judgment of the District Court and dismiss the indictment on the grounds that prosecution was barred by the statute of limitations?

5. Whether there is a real conflict between the decision below and the decision in *Grunewald* v. *United States* which warrants review by this Court?

6. Whether this Court should exercise its supervisory powers over lower federal courts in this case in view of petitioner's conviction for falsifying bank records in violation of 18 U.S.C. 1005, even though he was not even indicted or charged with any overt acts of falsification nor was there any proof adduced at all at the trial to prove petitioner made or caused to be made false bank entries.

7. Whether the courts below erred in failing to find that if the conspiracy was not complete with the last act of misapplication in November 1959, insofar as the petitioner is concerned, then the petitioner withdrew from the conspiracy when he was incarcerated in 1961 and wrote letters to the bank and the state banking commission requesting copies of his company's statements for the period here involved, plus the fact he had no contract with the bank nor its employees after late 1959 or early 1960?

8. Whether this Court should exercise its supervisory powers over the lower federal courts in this case due to the failure below to give recognition to the prosecutor's concession as to the statute of limitations on one count; the confusion in the Finding of Fact, Judgment and Decision below insofar as conviction for misapplication versus false entries is concerned; the second indictment on a same charge involving the same people, the same bank and the same period of time; the death of petitioner's key witness during this interval of time; the failure to properly investigate or discover the facts in the 1970 indictment which are identical or similar to those in the 1961 indictment, and whether all of this does not constitute a fundamental unfairness warranting review by this Court?

9. Whether the opinions and judgments below are so totally devoid of evidentiary support so as to render them unconstitutional under the due process clause of the Fourteenth Amendment?

10. Whether the federal conspiracy staute (18 U.S.C. 371) is so vague and indefinite so as to make it unconstitutional and thereby deprive petitioner of due process of law in that it fails to reasonably set forth when the substantive crime concerned is completed so as to permit the commencement of the running of the statute of limitations?

11. Whether there exists a general need for review of this case in order to clarify the decisional law interpreting 18 U.S.C. 371 and thereby establish criteria and guidelines in conspiracy cases so as to guide prosecutors and defendants as to when a concealment is in furtherance of a conspiracy and when it is merely a cover-up to avoid detection so as to avoid further and erroneous and harmful indictments?

12. Whether the very purpose of the statute of limitations (18 U.S.C. 3282) is not defeated and nullified by the interpretation given by the courts below and applied to this case concerning the conspiracy statute (18 U.S.C. 371)?

Statutory Provisions Involved

UNITED STATES CODE, Title 18:

Section 371. *Conspiracy to Commit Offense or to Defraud United States.*

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both. . . ."

Section 656. *Theft, Embezzlement, or Misapplication by Bank Officer or Employee.*

"Whoever, being an . . . employee of . . . any . . . insured bank . . . wilfully misapplies any of the moneys, funds or credits of such bank . . . shall be fined not more than $5,000.00 or imprisoned not more than five years, or both; . . ."

Section 1005. *Bank Entries, Reports and Transactions.*

". . . Whoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank . . . or to deceive any officer of such bank . . . or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System . . . shall be fined not more than $5,000.00 or imprisoned not more than five years, or both. . . ."

Section 3282. *Offenses Not Capital.*

"Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

UNITED STATES CODE, Title 28:

Section 1254. *Courts of Appeals; Certiorari; Appeal; Certified Questions.*

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

Statement of the Case

Petitioner was indicted on July 23, 1970, in the Southern District of New York with two bank employees. They were charged in Count 1 with conspiracy to misapply moneys of the Merchants Bank of New York and to make false entries in the bank's records, in violation of Title 18, United States Code, sections 371, 656, and 1005. In paragraph 2 of said Count, all three defendants were charged with misapplying moneys of the bank in violation of 18 U.S.C. 656; however, in paragraph 3 of said Count, only the two bank employees, and not petitioner, were charged with making false entries in the bank's records in violation of 18 U.S.C. 1005.

Paragraph 4 of said Count 1 spells out the means by which defendants were purported to have carried out this alleged conspiracy. Subparagraph (a) charges that the two bank employees, at petitioner's request, without authority would hold checks drawn on petitioner's two companies thereby causing the bank to pay said checks upon presentation without charging the appropriate accounts therefor. At the trial, the Assistant United States Attorney conceded that this charge was barred by the statute of limitations.

Subparagraph (b) charges that the two bank employees would cause false entries to be made in the bank's books so as to conceal the misapplication of the bank's moneys as set forth in subparagraph (a). Petitioner was not charged hereunder.

Subparagraph (c) charges all three defendants with misrepresenting, concealing and hiding said misapplication of the bank's moneys and false entries, clearly referring to subparagraph (a) of paragraph 4 of Count 1 of said indictment which was admittedly barred by the statute of limitations, and subparagraph (b) which likewise should be

barred because of its referral back to subparagraph (a) which was admittedly barred. The purpose of this subparagraph was very likely an attempt to circumvent the statute of limitations inasmuch as the last act in connection with the misapplication of bank's moneys occurred over ten years prior to the indictment, namely in November, 1959. There had been no contact between the petitioner and the other two defendant bank employees during this ten year period.

Next the indictment charges the two bank employees, in furtherance of the conspiracy, with an overt act of having a telephone conversation between each other on or about June 28, 1968. Petitioner was not charged nor mentioned in this first overt act.

Thereafter, bank employee Tolkoff is charged with seventy overt acts, each on a different date commencing July 30, 1965, and ending June 3, 1968, of making entries in the bank's books, reports and statements. In these counts 2 through 71, all three defendants are generally charged with unlawfully making or causing false entries to be made in the bank's books; however, in subparagraphs (a), (b) and (c) thereof, which define the modus operandi, only bank employee Tolkoff is charged with any acts. She is charged with falsely debiting various account ledgers up to $66,000.00 on the first business day of the month, and then on the last business day of the month she would falsely credit said ledgers up to said amount. In subparagraph (c) she was charged with causing the bank records to reflect the amount of inter-office clearing being inflated in amounts up to $66,000.00 on the last business day of the month.

Tolkoff was an experienced bookkeeper in the branch of the bank wherein petitioner's corporate account was maintained. In addition to petitioner's corporate account,

Tolkoff also concealed, by false entries, other accounts showing large deficits.

Petitioner was tried in May, 1971, without a jury. The two bank employees turned government witnesses and testified against petitioner. On May 13, 1971, petitioner was found guilty by Judge Tyler on all 71 counts. The judge rejected petitioner's arguments of double jeopardy, the statute of limitations, and collateral estoppel. On June 25, 1971, Judge Tyler sentenced petitioner to five years on Count 1, but suspended execution of sentence and placed petitioner on probation for five years subject to a standing order of that court. The Judge imposed a special condition of probation that petitioner make restitution not in excess of $10,000.00 on a schedule agreed to by the Probation Officer. Imposition of sentence on Counts 2 through 71 was suspended.

In his Findings of Fact and Conclusions of Law (Appendix D), Judge Tyler stated in his first sentence that petitioner knew *false entries* were being made for concealment purposes as well as fraud. The Judge made no specific mention of misapplication of bank funds.

The Judgment of the District Court (Appendix E) declares petitioner to have been convicted of making false entries in the bank records in violation of 18 U.S.C. 1005 and conspiracy to make such entries in violation of 18 U.S.C. 371. There was no conviction for violation of 18 U.S.C. 656, dealing with misapplication of the bank's moneys.

Petitioner thereafter appealed from said judgment of conviction to the United States Court of Appeals for the Second Circuit on the ground that his prosecution was barred by the statute of limitations (18 U.S.C. 3282). The Court below affirmed the conviction on June 22, 1972.

The Court of Appeals, in the first sentence of its opinion (Appendix F) stated in effect that petitioner had been convicted in the District Court "for having conspired with two bank employees to *misapply funds* of, and to make false entries" (Emphasis supplied). Throughout his opinion, Judge Waterman refers to the conviction below for misapplication of the bank's moneys.

The Court of Appeals rejected petitioner's argument that the last act of the conspiracy concerning himself took place in November, 1959, when the last act of misapplication of bank moneys occurred. The Court below refused to overturn the judgment of the District Court and hold that this Court's decision in *Grunewald* v. *United States*, 353 U.S. 371 (1957), was controlling and that the prosecution of petitioner was barred by the statute of limitations.

As background, petitioner was in the used car business in New York City in 1959. His company had been doing business with the Merchants Bank of New York for several years prior thereto. During the period of May, 1959 to November, 1959, it is claimed the three defendants conspired to misapply the bank's moneys. The total of these alleged misapplications approximated $66,000.00 and the last of these occurred in November, 1959.

Petitioner's first company went out of business in late 1959 and the bank recovered all of the company's property. From late 1959, petitioner had no contact with the bank or its personnel with the exception of making a request for certain bank records. However, bank employee Tolkoff continued to falsify the records of the former company's account, along with other accounts exceeding $230,000.00. The greatest portion of this sum had no connection with the petitioner.

The manager of a branch of Merchants Bank of New York, Mr. Bobrow, was prominently mentioned on the

trial of the indictment of the petitioner in the state courts of New York in 1960 for grand larceny on a bad check charge arising at or about the same time as the alleged misapplications herein, alleging automobiles which were used as collateral for a loan but were not in petitioner's possession as allegedly represented (Appendix A). Petitioner was convicted and sentenced to prison where he remained from 1961 to 1963. In 1963, petitioner's conviction was reversed and he was released from prison (*People* v. *Portner*, 19 A. D. 2d 620).

Mr. Bobrow arranged for various loans to be made to petitioner's company. In 1959 he joined petitioner in forming the new corporation through which all subsequent loans and transfers could be made in order to eliminate the deficit of approximately $66,000.00 which existed on the bank's records in the former company's account. A loan was in fact made to this new corporate account shortly after its formation of approximately $29,000.00 with Bobrow's assistance.

In 1961, petitioner was indicted in the United States District Court for the Southern District of New York with the aforementioned bank manager, Misha Bobrow and Frank Farinaro, an employee of the Merchants Bank of New York (Appendix B). They were charged with violating the same sections of the law as in the instant case, namely 18 U.S.C. 371, 656 and 1005. They were charged with misapplying funds of the bank during the period from January 1, 1959 to March 17, 1961. The period covers the *entire* period of alleged misapplication in the indictment hereunder review. In fact the overt acts cover a period of August 19, 1959, to November 30, 1959, or virtually the exact same period as the dates of alleged misapplication in the case at hand. It charges them with false entries and with concealment. This case was tried

in 1965 and was dismissed after the prosecution's case for failure of evidence. In the meantime, the defendant Bobrow had died in May of 1962. Bobrow was the person at the bank with whom petitioner had most of his dealings. The petitioner had virtually no contact with the other bank employees.

While petitioner was incarcerated during 1961 to 1963, he wrote several letters to the Merchants Bank of New York and the New York State Banking Department requesting copies of bank statements for his company for the months of October and November, 1959, which covered the periods, in part at least, for all three indictments of the petitioner, including the one with which we are here concerned. The inquiries were ignored even though petitioner complained in his letter to the State Banking Commission that the bank itself refused to honor his request.

The two bank employees who were co-defendants in this case but who turned government witnesses, admitted they had no contact with petitioner from at least early 1960 to trial in 1971 (Transcript 106, 123, 131, 190). Witness Tolkoff said it was her plan and she alone thought up the method of concealment. She admitted petitioner never told her how to do it. It was the branch manager of the bank, Mr. Bobrow, who told her what to do (Transcript 114) and whether to hold or pay the checks (Transcript 107). She said the last time petitioner asked her to hold out a check was in May, 1959 (Transcript 105). She knew petitioner had gotten a loan of $40,000.00 (Transcript 110) and knew he had a line of credit (Transcript 113). She admitted petitioner never asked her to charge other accounts nor falsify the books (Transcript 119). She testified she continued to falsify books even though she hadn't seen the petitioner for eight to nine years (Transcript 131). She confessed what she was doing regarding the

false entries on June 28, 1968, when the bank was going onto a computer system (Transcript 144-145).

Petitioner opened a used car business in New Jersey and on August 1, 1968, was interviewed by the FBI. He denied any business in New York and any account with Merchants Bank of New York. Thereafter petitioner was indicted on the case hereunder consideration.

REASONS FOR GRANTING THE WRIT

1. The Liberal Interpretation of the Federal Conspiracy Statute, 18 U.S.C. 371, by the Trial and Appellate Courts Below, Deprives Petitioner of Due Process by Preventing Him the Right to Raise the Defense of Statute of Limitations under 18 U.S.C. 3282.

It is urged that a liberal and sweeping interpretation of the statute dealing with conspiracy (Title 18, United States Code, section 371) in regard to the acts perpetrated long after the harm prohibited by the substantive criminal statute has occurred, presents the clear danger of depriving an accused of due process of law by preventing him from raising the defense of the statute of limitations.

The statute of limitations governing the offense in this case is found in Title 18, United States Code, section 3282. This statute prohibits prosecutions commenced more than five years after an offense has been committed.

The statute of limitations is a cornerstone of our system of jurisprudence and it has a well defined and established purpose. The most recent analysis of the statute of limitations and perhaps the most cogent definition of its purpose is found in the case of *Toussie* v. *United States,* 397 U.S. 114, in which the Court stated at page 115:

"The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. For these reasons and others, we have stated before 'the principle that criminal limitations statutes are to be liberally interpreted in favor or repose.' "

In the case now before this Court, it was established that the first act which was perpetrated occurred in 1959, allegedly in violation of 18 U.S.C. 656. The petitioner was indicted in 1970. In 1962 the bank manager, Mr. Misha Bobrow, with whom the petitioner had conducted most if not all of his banking activities, had died. The transcript is replete with references to the bank manager and his participation in the activities of 1959.

The bank manager was intricately involved with the petitioner in all of the incidents which gave rise to the offenses upon which the indictment herein is based. Thus, not being able to call the bank manager as a witness severely prejudiced the petitioner's defense to this prosecution. The very purpose of the statute of limitations is to prevent prosecutions from being delayed to a time when the accused is irreparably harmed and prejudiced by the unavailability of evidence and of witnesses. This is the very happening which the Court wished to prevent by enunciating the principle in *Toussie* v. *United States*,

suppra. However, the Court of Appeals failed to properly interpret 18 U.S.C. 371 and follow the dictates of the *Toussie* case.

2. Assuming Arguendo Petitioner Was Properly Chaarged With Misapplication of Bank Funds in Violatioon of 18 U.S.C. 656, and Assuming Further This Chaarge Was Not Barred by the Prosecutor's Concession, Thaen the Violation of the Statute Occurs at the Moment thee Assets Are Unlawfully Appropriated and the Statute of Limitations Would Commence to Run From That Mooment.

The petitioner was convicted in May of 1971 of conspiracy to violate 18 U.S.C. 656, which section reads as follows:

> "Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve Bank, member bank or insured bank, or a receiver of a national bank, or any agent or employee of a Federal Reserve Agent or Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000.00 or imprisoned not more than five years, or both; . . ."

Clearly the intent of Congress when enacting the statute was to render unlawful only the acts of misapplication, embezzlement, abstracting, and purloining. The act of misapplication, for example, would occur at the moment the bank was injured or defrauded by the improper and un-

lawful diversion of its moneys or funds. Hence, the concept of misapplication is narrowly defined to include only the immediate consequences of the singular act of unlawfully diverting moneys or funds of a bank. (*United States* v. *Fortunato*, 402 F.2d 79 [2nd Cir. 1968]).

The purpose of the statute is to protect and preserve the assets of certain enumerated banks. Thus a violation of the statute occurs at the moment the assets are unlawfully appropriated or diverted. (*Garrett* v. *United States*, 396 F.2d 489 [5th Cir. 1968]).

3. The Court Below Erred in That It Failed to Apply the Doctrine in *Toussie v. United States* and Hold That the Misapplication of Bank Moneys Under 18 U.S.C. 656 Was Not a Continuing Offense and Therefore, the Charge of Misapplication Was Barred by the Statute of Limitations Inasmuch as the Statute Commenced Running From the Date of the Last Act of Misappropriation in November, 1959.

The Court of Appeals was clearly in error when it held that the act of misapplication herein had extended over the period of nine years from 1959 until 1968 based upon the theory that the falsifying of the records of the bank in order to conceal the one or several acts in 1959 was part of the basic offense.

This offense cannot be deemed to be a continuing one since it appears certain from the statute that the Congress never intended it to be so. However, this Court has not definitively ruled on this question nor indicated in a specific case the method of implementing the principle enunciated in *Toussie* v. *United States, supra.*

The Court held in *Toussie* v. *United States, supra,* at page 115:

"These principles indicate that the doctrine of continuing offenses should be applied in only limited circumstances since, as the Court of Appeals correctly observed in this case, '[t]he tension between the purpose of a statute of limitations and the continuing offense doctrine is apparent; the latter, for all practical purposes, extends the statute beyond its stated term.' 410 F.2d at 1158. These considerations do not mean that a particular offense should never be construed as a continuing one. They do, however, require that such a result should not be reached *unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.*" (Emphasis supplied)

The acts of the alleged co-conspirators in making false entries in the records of the bank in order to conceal the prior payment of drafts against overdrawn accounts were not in furtherance of the offense, since the acts injuring the bank had already taken place and were completed. The bank was harmed in 1959, as a result of several acts by which a sum of money was paid out, although the account charged was overdrawn and did not have such moneys available. No further harm to the bank or danger to the funds entrusted to it could have been perpetuated by the acts occurring in the nine year period after the initial acts. The initial acts fixed and determined the extent of the loss to the bank in a definite monetary amount.

4. There Is a real Conflict Between the Decision Below and the Decision in *Grunewald v. United States* in That the Court Below Erred in Not Holding That *Grunewald* Was Controlling.

There is a direct conflict between the decision herein of the Court of Appeals of which review is being sought and the *Grunewald* decision of this Court. Certiorari should be granted and the issues herein clarified where the Court of Appeals has misconstrued, misapplied and misconceived an applicable Supreme Court opinion. (*Mc Candless* v. *Furland,* 296 U.S. 140; *Upshow* v. *United States,* 335 U.S. 410; *Wilkinson* v. *United States,* 365 U.S. 399; *Schlude* v. *Commissioner,* 372 U.S. 128)

Even if this Court should determine that the *Grunewald* case is distinguishable and not controlling, then the judgment below should nevertheless be reviewed since the *Grunewald* case is ripe for reexamination and possible extension.

All of the overt acts perpetuated in the nine year period after the initial acts in 1959 were acts of concealment rather than acts in furtherance of the basic crime. The Court explicitly defined the difference between acts done in furtherance of the conspiracy and acts done to conceal a conspiracy in the case of *Grunewald* v. *United States,* 353 U.S. 371 (1957), by stating at pages 404-405:

> "Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions. The important considerations of policy behind such warnings need not be again detailed. See Jackson, J., concurring in *Krulewitch* v. *United States, supra.* It is considerations of policy which govern our holding today. As this case was tried, we have before

> us a typical example of a situation where the Government, faced by the bar of the three year statute, is attempting to open the very floodgates against which *Krulewitch* warned. We cannot accede to the proposition that the duration of a conspiracy can be indefinitely lengthened merely because the conspiracy is kept a secret, and merely because the conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purpose has been accomplished.

The duration of a conspiracy depends on the facts of the particular case and the agreement arrived at among the parties. A conspiracy ends when the purpose for which it was formed has been achieved. An agreement to maintain secrecy after the main objective of the conspiracy has been accomplished cannot be implied by the mere fact that acts were done to conceal the basic offense. (*United States* v. *Hickey*, 360 F.2d 127 [7th Cir. 1966]).

The Court of Appeals was in error when it presumed without any facts to support such that an agreement to conceal the acts perpetrated in 1959 was arrived at between the parties. Although in all likelihood the parties realized the benefits of secrecy after the initial acts were perpetrated, this was not a part of the main objective of the conspiracy. There is no evidence in this case to support such presumption. In this case the principal aim of the conspiracy was to obtain money from a bank without maintaining a sufficient balance in an account. This objective was achieved in 1959. The continuing acts thereafter did nothing to further this already accomplished objective, since the parties merely concealed a completed act.

The Court of Appeals misinterpreted the object of the conspiracy by holding at page 26a-27a, Appendix F:

"Clearly, the concealment of the misapplication of funds through the making by Tolkoff and Calabro of false entries in the bank's records was in furtherance of the continuing conspiracy."

The object of the conspiracy was to take moneys out of the bank and convert them to the use of the petitioner. Maintaining secrecy by continuing false entries in the records of the bank was not the main object or purpose of the conspiracy, but the natural consequences of an unlawful act.

In *Grunewald* v. *United States*, supra, at page 402, the Court warned of the dangers inherent in the adoption of the very principles adopted by the Court of Appeals in the case herein by stating:

"Acts of covering up, even though done in the context of a mutually understood need for secrecy, *cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement among the conspirators.* For every conspiracy is by its very nature secret; a case can hardly be supposed where men concert together for crime and advertise their purpose to the world. And again, every conspiracy will inevitably be followed by actions taken to cover the conspirators' traces. *Sanctioning the Government's theory would for all practical purposes wipe out the statute of limitations in conspiracy cases, as well as extend indefinitely the time within which heresay declarations will bind co-conspirators.*" (Emphasis supplied).

Assuming arguendo that the petitioner was aware that the alleged co-conspirators would probably conceal the acts of misapplication, rather than announce them to the world, that reasonable assumption alone is not enough to continue

the conspiracy during the nine year period following the perpetration of the initial act. Knowledge alone is not enough to include the petitioner in a continuing conspiracy. It must be shown that he is in some sense promoting the venture himself and making it his own even though it may appear that he could, perhaps indirectly and without any participation on his part, benefit from the outcome of these acts of concealment. (*United States* v. *Falcone*, 109 F.2d 579, [9th Cir. 1940], aff'd 311 U.S. 205).

Nowhere in the opinion of the Court of Appeals is any reference made to the petitioner's participation in or adoption of the acts of making false entries in the records of the bank during the nine year period. Furthermore there is not even an allegation of an overt act by petitioner in this regard and there was no proof at all at the trial to show petitioner made or caused false entries to be made in the bank's records. The Court of Appeals merely stated that most likely the petitioner knew what was occurring in those nine years and he obviously benefitted from those acts. However, in reality the petitioner did not benefit from those acts of concealment but was actually harmed, since while they were continuing an important witness to his defense, Misha Bobrow (the bank manager), had died.

5. Petitioner Was Erroneously Convicted of Falsifying Bank Records in Violation of 18 U.S.C. 1005 in That He Was Not Even Charged With Any Overt Acts of Making False Entries and There Was No Evidence At All That He Made Such Entries.

It is interesting to note that the counts of the indictment in this case relating to the alleged conspiracy to *falsify bank records* are devoid of any reference to the petitioner. These particular counts properly charge only the bank employees with this offense. However, the District Court er-

roneously found the petitioner guilty of all of the substantive counts of the indictment, hence including the conspiracy to falsify the bank records. This error was rendered in the judgment of the District Court which contained an allegation of the petitioner's guilt of the offense of falsifying bank records in spite of the lack of evidence thereof and the absence of such a charge in the indictment.

6. If the Conspiracy Was Not Over at the Time of the Last Act of Misapplication of Bank Moneys in November, 1959, Insofar as Petitioner Is Concerned, Then He Withdrew From the Conspiracy When He Was Incarcerated in 1961,When He Wrote Letters to the Bank Itself and the State Banking Commission Requesting Copies of His Company's Bank Statements and When He No Longer Had Contact or Transactions With the Bank and Its Employees.

It is obvious by the facts adduced at the trial of this prosecution, that the petitioner withdrew from the conspiracy in 1960. He disappeared, and the fact of his disappearance was known to his alleged co-conspirators. Further, there came a time in 1960 when the petitioner was incarcerated in a penal institution.

The trial transcript indicated that two letters were written by the petitioner to the bank involved wherein he requested bank statements. At least one additional letter was sent by the petitioner to a state regulatory agency complaining about the fact that he could not get these statements. At the time this letter was written, the petitioner was still within the penal institution and apparently wished to use these statements to support the appeal of his conviction. This conduct is certainly not consistant with an intent to conceal, which the Court of Appeals would wish us to believe the petitioner entertained. Directing the attention of the recipients of the letters to the fact that peti-

tioner's bank statements were not available to him, belies any intent on his part to be a part of a conspiracy to continue the concealment of the impropriety surrounding his bank account.

Although conceding that incarceration alone cannot be the basis of a withdrawal from a conspiracy, other evidence may indicate that the jailed person withdrew from the conspiracy. (*United States* v. *Borelli*, 336 F.2d 376, [2nd Cir. 1964]).

The petitioner's conduct in writing to the very bank that not only employed his alleged co-conspirators, but was also the institution whose records were being falsified, certainly is evidence of the fact of the petitioner's lack of complicity in the conspiracy. The Court of Appeals erroneously failed to consider the evidentiary effect of these letters and the unlikelihood of such conduct by a person who was allegedly a part of a conspiracy to conceal. The conduct of the petitioner herein is the type of evidence that the Court in *United States* v. *Borelli, supra,* referred to as necessary to indicate a withdrawal from a conspiracy on the part of an incarcerated person.

7. This Court Should Exercise Its Supervisory Powers Over the Lower Federal Courts in This Case.

This Court should in this case exercise its supervisory powers over the lower federal courts. The many points raised heretofore warrant review by this Court. The failure to give recognition to the prosecutor's concession that the statute of limitations had run against one of the charges and the failure to recognize that subsequent charges also necessarily had to be barred as a matter of law because they related and referred back to the charge that was concededly barred, are examples of the seriousness of what transpired below. The confusion in the Findings of

Fact and Judgment in the District Court and the decision in the Court of Appeals regarding misapplication versus false entries is another example. Petitioner was never charged with any overt acts in connection with false entries but he was so charged in connection with misapplication. Yet the trial Judge made no mention of any conviction for misapplication but sanctioned specifically the making of false entries. The Judgment of the District Court only refers to a conviction on the false entries charge and is silent on the misapplication charge. There was absolutely no evidence whatsoever to prove petitioner made or conspired to make any false entries and yet he is convicted thereof.

The Court of Appeals continued by referring in its decision to a conviction on both misapplication and false entry charges.

The District Court failed to grant petitioner's defense of double jeopardy even though he was previously indicted on the exact same charges for similar or same transactions with the same bank involving the same people during the exact time frame. That previous case was dismissed on defense motion after the prosecutor's case for failure to make out a prima facie case. This tends to show either the absurdity of the charges which are the same in this case or the ineptness of the investigation and the prosecution. Whichever the reason, either is bad and should not be tolerated or condoned. With this the prosecutor asks that the conspiracy statute be so interpreted so as to avoid a bar because of the statute of limitations. With this request, at this late date, the prosecutor has knowledge that the very person, and the sole person, who could have helped petitioner was the bank manager with whom petitioner had all or most of his dealings and this bank manager has been dead for eight years preceding the indictment, nine years

preceding the trial and ten years preceding this application. These things certainly must constitute a fundamental unfairness from which the government should not be entitled to benefit. The least they were bound to do, in view of the similarity of charges in the 1961 and 1970 indictments, was to investigate and discover the alleged facts charged in the 1970 indictment. If they didn't discover the alleged facts charged in the 1970 indictment, they should have discovered them inasmuch as they are the same or similar facts discovered and used in 1961, arising out of the same or similar transactions with the same people at the same time at the same bank and place.

Certainly the petitioner's whereabouts were well known during the time of the 1960 and 1965 trials. Further, there was sufficient notice that several employees of the bank were engaged in improper activities causing certain disorders at the bank. Any properly conducted investigation at the time of the 1961 indictment would have revealed the extent of the disorders at the bank including the acts which are now the basis of the case before the Court.

In *Hoag* v. *State of New Jersey*, 356 U.S. 464 (1958) the Court in considering separate prosecutions for each of several crimes which occurred at one time stated at page 467:

> ". . . The question is whether this case involved an attempt 'to wear the accused out by a multitude of cases with accumulated trials' . . . *The question in any given case is whether such a course has led to fundamental unfairness* . . ." (Emphasis supplied).

Consequently, it seems that the Court is concerned with the basic concept of fairness and order in our system of justice when considering the question of due process in

relation to separate indictments and prosecutions of offenses arising out of the same incident.

Certainly if law enforcement agents investigate a bank and particular bank employees in order to obtain evidence in support of an indictment filed in 1961, they should be charged with prosecuting all that the investigation reveals or should reasonably be expected to reveal. It would be unfair and would constitute harrassment of an accused if a prosecution were conducted piecemeal either intentionally or as a result of an inept investigation not being as fruitful as possible.

To burden the petitioner with the defense of a criminal trial, twelve years after the occurrence of the substantive criminal act and years after the death of a necessary witness is oppressive and an example of the "fundamental unfairness" the Court spoke of in *Hoag* v. *State of New Jersey, supra.*

On this Court rests the prime responsibility for the proper functioning of the federal judiciary. The frequent grant of certiorari in cases involving federal jurisdiction, practice and procedure reflects that responsibility. Such cases qualify for review by reason of their importance, novelty or difficulty, with a conflict of decisions who play a significant role. Rule 19 recognizes the appropriateness of the grant of certiorari in this type of case when the federal appellate decision "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a course by a lower court, as to call for an exercise of this Court's power of supervision." This Court has previously granted review in similar cases concerning administration of criminal justice in the federal courts (*Mc Nabb* v. *United States,* 318 U.S. 332; *Marshall* v. *United States,* 360 U.S. 310).

8. The Interpretation of the Federal Conspiracy Statute, 18 U.S.C. 371, Is Sufficiently Important to Warrant Review of the Opinion and Judgment Below.

The issues raised herein are of wide importance in that they involve an interpretation and application of two federal statutes which are widely used, namely, 18 U.S.C. 371 and 3282. The resolution of the questions presented here, will therefore, have immediate importance far beyond the particular facts and parties involved in the case at hand. They are issues of general interest and substantial importance.

This issue of interpretation of the federal conspiracy statute and the applicability of the statute of limitations is therefore an important question of federal law and major significance which should be determined by this Court, not only for this case, but for general application and guidance of prosecutors and defense counsel as well. This is not an academic nor episodic problem.

In view of the various types of issues involved herein, the way in which the decision was reached below as set forth in the Statement of the Case, the uncertain status of the law in the areas with which we are here concerned, the serious question as to the correctness of the decision below for failing to hold the *Grunewald* case as governing and the various other points heretofore mentioned, and finally the nature and number of persons who may be affected by resolution of these issues including parties and lawyers and both prosecutors and defense counsel, this matter is sufficiently important from a public point of view to warrant further review.

9. The Decisions Below Are So Totally Devoid of Evidentiary Support so as to Render Them Unconstitutional Under the Due Process Clause of the Fourteenth Amendment.

These problems heretofore mentioned are sufficiently shocking so as to present substantial due process questions. Therefore, although concededly this Court will not reasonably consider for review questions of evidence and facts, nevertheless review should be granted for all reasons stated including these reasons because of the over-all general importance of the resolution of the issues herein. In *Thompson* v. *City of Louisville*, 362 U.S. 199, this Court granted certiorari on ultimate fact issues because the same were so totally devoid of evidentiary support as to render the conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

The issues presented here are of such general importance, and for all the reasons heretofore stated, that a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

HOWARD FRANKLIN CERNY
Attorney for Petitioner
345 Park Avenue
New York, New York 10022

HOWARD F. CERNY
JOHN J. MEGLIO
RICHARD SILVER
Of Counsel

August 21, 1972

Certificate of Service

[SAME TITLE]

I hereby certify that on this 21st day of August, 1972, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Honorable Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Room 5143, Washington, D. C. 20530, Counsel for the Respondent. I further certify that all parties required to be served have been served.

HOWARD FRANKLIN CERNY
345 Park Avenue
New York, New York 10022
Attorney for Petitioner

Appendix "A"

(1959 State of New York Indictment)

THE INDICTMENT

The Grand Jury of the County of New York, by this indictment, accuse the above named defendant of the crime of Grand Larceny in the First Degree, committed as follows:

The defendant, in the County of New York, on or about October 20, 1959 with the intent to deprive and defraud another of property, and of the use and benefit thereof, and to appropriate the same to his own use, and to the use of someone other than the true owner, stole property owned by George Harris, Gus Harris and Irving Harris, doing business as G.I.G. Holding Co., having an aggregate of $4,500.00, to wit, a check.

Said theft was effected by means of false and fraudulent representations and pretenses made by the said defendant to Irving Harris, secretary of G.I.G. Holding Co., namely that said defendant owned and had in his possession 9 certain automobiles which were to serve as collateral for a loan he was obtaining from George Harris, Gus Harris and Irving Harris, doing business as G.I.G. Holding Co.

Said representations and pretenses were fraudulent and false and were known by the defendant to be fraudulent and false at the time they were made.

In fact, said defendant did not own and did not have in his possession 9 certain automobiles which were to serve as collateral for a loan he was obtaining from George Harris, Gus Harris and Irving Harris, doing business as G.I.G. Holding Co.

A second count also charges grand larceny in the first degree, committed by the defendant in the same manner, but "on or about November 4, 1959."

Appendix "B"

(1961 Federal Indictment)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Cr. 269

UNITED STATES OF AMERICA,

—v.—

MISHA BOBROW, FRANK FARINARO, and NATHAN PORTNER,

Defendants.

The Grand Jury charges:

1. From on or about the 1st day of January, 1959, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, Misha Bobrow and Frank Farinaro, defendants herein, being officers and employees of the Merchants Bank of New York, a bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and Nathan Portner, also a defendant herein, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other, and with others to the Grand Jury unknown, to commit certain offenses against the United States, to wit, to violate Title 18, United States Code, Sections 656 and 1005.

2. It was a part of said conspiracy that defendants Misha Bobrow, Frank Farinaro, and Nathan Portner, would

wilfully misapply and cause to be misapplied monies, funds and credits of the Merchants Bank of New York in amounts in excess of $100.

3. It was further a part of said conspiracy that defendant Frank Farinaro would accept for cashing, at the Merchants Bank of New York, a check drawn by defendant Nathan Farinaro would accept for cashing, at the Merchants Bank of New York, a check drawn by defendant Nathan Portner on the account of Nathan Portner at said bank when Frank Farinaro and Nathan Portner knew that said account had insufficient funds to cover said check.

4. It was further a part of said conspiracy that defendant Misha Bobrow would approve for payment by the Merchants Bank of New York checks of defendant Nathan Portner drawn on the account of Nathan Portner at said bank knowing that said account did have insufficient funds and credits on deposit to cover said checks.

5. It was further a part of said conspiracy that defendants Misha Bobrow, Frank Farinaro, and Nathan Portner would make and cause to be made false entries in the books, reports and statements of the Merchants Bank of New York with the intent to deceive the officers of said bank, the Federal Deposit Insurance Corporation, the agents and examiners appointed to examine the affairs of said bank and the Board of Governors of the Federal Reserve System.

6. It was further a part of the said conspiracy that defendants Misha Bobrow, Frank Farinaro, and Nathan Portner, and other conspirators to the Grand Jury unknown, would at all times misrepresent, conceal and hide,

and cause to be misrepresented, concealed and hidden, the purpose of the acts done in furtherance of said conspiracy.

OVERT ACTS

In furtherance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about the 19th day of August, 1959, defendant Frank Farinaro received a note from defendant Nathan Portner.

2. On or about the 19th day of August, 1959, defendant Frank Farinaro cashed a check for defendant Nathan Portner in the amount of $6,000.

3. On or about the 20th day of August, 1959, defendant Frank Farinaro made an entry in the records of the Merchants Bank of New York.

4. On or about the 27th day of October, 1959, defendant Misha Bobrow issued a cashier's check, from the funds of the Merchants Bank of New York, payable to L. R. Richards & Co.

5. On or about the 27th day of October, 1959, defendant Nathan Portner issued a check in the amount of $3,200.

6. On or about the 27th day of October, 1959, defendant Misha Bobrow approved a check for payment in the amount of $3,200.

7. On or about the 28th day of October, 1959, defendant Nathan Portner issued a check in the amount of $3,675.

Appendix "B"

8. On or about the 28th day of October, 1959, defendant Misha Bobrow approved a check for payment in the amount of $3,675.

9. On or about the 28th day of October, 1959, defendant Misha Bobrow certified a check payable to Fairway Jamaica Corporation in the amount of $1,454.75.

10. On or about the 30th day of October, 1959, defendant Misha Bobrow approved a check for payment to Isadore Galfunt in the amount of $5,000.

11. On or about the 6th day of November, 1959, defendant Nathan Portner issued a check in the amount of $1,425.

12. On or about the 6th day of November, 1959, defendant Misha Bobrow approved a check for payment in the amount of $1,425.

13. On or about the 30th day of November, 1959, defendant Misha Bobrow made an entry in the depositor's book of Isadore Galfunt.

(Title 18, United States Code, Section 371).

COUNT TWO

The Grand Jury further charges:

On or about the 19th day of August, 1959, in the Southern District of New York, Frank Farinaro, a defendant herein, being then an employee of the Merchants Bank of New York, a bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and Nathan Portner, also a defendant herein, unlawfully, wilfully and knowingly did misapply monies, funds and credits of said

bank in the amount of approximately $6,000 by cashing a check in the amount of $6,000, drawn by Nathan Portner on the said bank, knowing that the account of Nathan Portner did not contain sufficient funds to cover said check.

(Title 18, United States Code, Sections 2 and 656).

COUNT THREE

The Grand Jury further charges:

On or about the 22nd day of August, 1959, in the Southern District of New York, Frank Farinaro and Nathan Portner, defendants herein, unlawfully, wilfully and knowingly, and with intent to deceive the officers of the Merchants Bank of New York, the Federal Deposit Insurance Corporation, the agents and examiners appointed to examine the affairs of said bank, and the Board of Governors of the Federal Reserve System, did make and cause to be made a false entry in a book, report and statement of the Merchants Bank of New York, a bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, to wit, a teller's proof sheet, to the effect that the cash on hand when said bank opened on August 22, 1959, was approximately $141,783.16, whereas in truth and in fact, as the defendants then and there well knew, the actual cash on hand when said bank opened on August 22, 1959 was $6,000 less than the amount stated thereon.

(Title 18, United States Code, Sections 2 and 1005).

COUNT FOUR

The Grand Jury further charges:

On or about the 28th day of October, 1959, in the Southern District of New York, Misha Bobrow, a defendant

herein, being then an officer and employee of the Merchants Bank of New York, a bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and Nathan Portner, also a defendant herein, unlawfully, wilfully and knowingly did misapply monies, funds and credits of said bank in the amount of approximately $3,200, by causing a check to be cashed in the amount of $3,200, payable to cash and drawn by Nathan Portner on the said bank, knowing that the account of Nathan Portner did not contain sufficient funds to cover said check.

(Title 18, United States Code, Sections 2 and 656).

COUNT FIVE

The Grand Jury further charges:

On or about the 28th day of October, 1959, in the Southern District of New York, Misha Bobrow, a defendant herein, being then an officer and employee of the Merchants Bank of New York, a bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and Nathan Portner, also a defendant herein, unlawfully, wilfully and knowingly did misapply monies, funds and credits of said bank in the amount of approximately $3,675, by causing a check to be cashed in the amount of $3,675, payable to cash and drawn by Nathan Portner on the said bank, knowing that the account of Nathan Portner did not contain sufficient funds to cover said check.

(Title 18, United States Code, Sections 2 and 656).

COUNT SIX

The Grand Jury further charges:

On or about the 28th day of October, 1959, in the Southern District of New York, Misha Bobrow, a defendant

herein, being then an officer and employee of the Merchants Bank of New York, a bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and Nathan Portner, also a defendant herein, unlawfully, wilfully and knowingly did misapply monies, funds and credits of said bank in the amount of approximately $5,000, by causing a check to be cashed in the amount of $5,000, payable to Isadore Galfunt and drawn by Nathan Portner on the said bank, knowing the account of Nathan Portner did not contain sufficient funds to cover said check.

(Title 18, United States Code, Sections 2 and 656).

COUNT SEVEN

The Grand Jury further charges:

On or about the 30th day of November, 1959, in the Southern District of New York, Misha Bobrow and Nathan Portner, defendants herein, unlawfully, wilfully and knowingly, and with intent to deceive the officers of the Merchants Bank of New York, the Federal Deposit Insurance Corporation, the agents and examiners appointed to examine the affairs of said bank, and the Board of Governors of the Federal Reserve System, did make and cause to be made a false entry in a book, report and statement of the Merchants Bank of New York, a bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, to wit, the deposit book for the account of Isadore Galfunt, to the effect that on November 30, 1959, Isadore Galfunt deposited the amount of $5,000 in said bank, whereas, in truth and in fact as the defendants then and there well knew, Isadore Galfunt, on November 30, 1959, did not deposit the amount of $5,000 in said bank.

(Title 18, United States Code, Sections 2 and 1005).

Appendix "B"

COUNT EIGHT

The Grand Jury further charges:

On or about the 28th day of October, 1959, in the Southern District of New York, Misha Bobrow, a defendant herein, being then an officer and employee of the Merchants Bank of New York, a bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and Nathan Portner, also a defendant herein, unlawfully, wilfully and knowingly did certify and caused to be certified a check, dated October 28, 1959, drawn by Nathan Portner on the Merchants Bank of New York and payable to Fairway Jamaica Corporation in the amount of $1,454.75, before the amount of said check had been regularly deposited in said bank by the drawer thereof.

(Title 18, United States Code, Sections 2 and 1004).

/s/ JOHN I. BARING
Foreman

/s/ MORTON S. ROBSON
Morton S. Robson
United States Attorney

Appendix "C"

(1970 Federal Indictment)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Cr. 597 (HRT)

UNITED STATES OF AMERICA,

—v—

NATHAN PORTNER, REBECCA TOLKOFF and JOSEPH CALABRO,

Defendants.

The Grand Jury charges:

1. From on or about the 25th day of August, 1959, and continuously thereafter up to and including the 28th day of June, 1968, in the Southern District of New York, Nathan Portner, Rebecca Tolkoff and Joseph Calabro, the defendants, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to commit certain offenses against the United States, to wit, to violate Title 18, United States Code, Sections 656 and 1005.

2. It was a part of said conspiracy that the defendants Rebecca Tolkoff and Joseph Calabro, being employees of the Merchants Bank of New York (hereinafter "Bank"), a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation, and the defendant Nathan Portner would wilfully misapply and cause to be misapplied monies, funds and credits of the Bank in amounts in excess of $100.

Appendix "C"

3. It was further a part of said conspiracy that the defendants Rebecca Tolkoff and Joseph Calabro would make and cause to be made false entries in the books, reports and statements of the Bank with intent to injure and defraud said bank, and with intent to deceive the officers of said Bank, the Federal Deposit Insurance Corporation, the agents and examiners appointed to examine the affairs of said Bank and the Board of Governers of the Federal Reserve System.

4. Among the means by which the defendants would carry out the said conspiracy were:

(a) The defendants Rebecca Tolkoff and Joseph Calabro, at the request of the defendant, Nathan Portner, would hold, without authority of the Bank, checks drawn on the accounts of Car Buyers and Elmhurst Motor Sales Inc., thereby causing the Bank to pay said checks upon presentation without charging said accounts for the amount of said checks.

(b) The defendants Rebecca Tolkoff and Joseph Calabro would cause false entries to be made in the books, reports and statements of the Bank so as to conceal the misapplication of funds of the Bank as set forth in subpart (a) of paragraph 4 of this Indictment.

(c) The defendants Nathan Portner, Rebecca Tolkoff and Joseph Calabro would take all necessary steps to misrepresent, conceal and hide and cause to be misrepresented, concealed and hidden, said misapplication of funds of the Bank and said false entries in the books, reports and statements of the Bank.

Appendix "C"

OVERT ACTS

Im furtherance of said conspiracy, and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York:

1. On or about June 28, 1968, the defendant Rebecca Tolkoff had a telephone conversation with the defendant Joseph Calabro.

OVERT ACTS TWO THROUGH SEVENTY-ONE

On or about the following dates Rebecca Tolkoff, the defendant, made entries in the books, reports and statements of the Bank:

OVERT ACT	DATE
2	July 30, 1965
3	August 2, 1965
4	August 31, 1965
5	September 1, 1965
6	September 30, 1965
7	October 1, 1965
8	October 31, 1965
9	November 1, 1965
10	November 30, 1965
11	December 1, 1965
12	December 31, 1965
13	January 3, 1966
14	January 31, 1966
15	February 1, 1966
16	February 28, 1966
17	March 1, 1966
18	March 31, 1966
19	April 1, 1966
20	April 29, 1966

Appendix "C"

Overt Act	Date
21	May 2, 1966
22	May 31, 1966
23	June 1, 1966
24	June 30, 1966
25	July 1, 1966
26	July 29, 1966
27	August 1, 1966
28	August 31, 1966
29	September 1, 1966
30	September 30, 1966
31	October 3, 1966
32	October 31, 1966
33	November 1, 1966
34	November 30, 1966
35	December 1, 1966
36	December 30, 1966
37	January 3, 1967
38	January 31, 1967
39	February 1, 1967
40	February 28, 1967
41	March 1, 1967
42	March 31, 1967
43	April 3, 1967
44	April 28, 1967
45	May 1, 1967
46	May 31, 1967
47	June 1, 1967
48	June 30, 1967
49	July 3, 1967
50	July 31, 1967
51	August 1, 1967
52	August 31, 1967

Appendix "C"

Overt Act	Date
53	September 1, 1967
54	September 29, 1967
55	October 2, 1967
56	October 31, 1967
57	November 1, 1967
58	November 30, 1967
59	December 1, 1967
60	December 29, 1967
61	January 2, 1968
62	January 31, 1968
63	February 1, 1968
64	February 29, 1968
65	March 1, 1968
66	March 29, 1968
67	April 1, 1968
68	April 20, 1968
69	May 1, 1968
70	May 31, 1968
71	June 3, 1968

(Title 18, United States Code, Section 371.)

Counts Two through Seventy-One

The Grand Jury further charges:

1. The allegations contained under the heading "Overt Acts Two through Seventy-One" of Count 1 of this Indictment are repeated and realleged as though fully set forth herein as constituting Counts Two through Seventy-One of this Indictment.

2. On or about each of the dates hereinabove set forth, under the heading "Overt Acts Two through Seventy-

ONE" of Count 1 of this Indictment, in the Southern District of New York, the defendants Nathan Portner, Rebecca Tolkoff and Joseph Calabro unlawfully, wilfully and knowingly, with intent to defraud the Merchants Bank of New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation, and with intent to deceive the officers of said Bank, the Federal Deposit Insurance Corporation, the agents and examiners appointed to examine the affairs of said Bank, and the Board of Governors of the Federal Reserve System, did make and cause to be made false entries in the books, reports and statements of said Bank, including ledgers of various accounts, and the records reflecting clearings among the branches of said Bank;

(a) On or about the first business day of each month, the ledgers of various accounts of said Bank would be debited falsely in amounts totaling up to $66,000. by the defendant Rebecca Tolkoff.

(b) On or about the last business day of each month, the ledgers of various accounts of said Bank would be credited falsely in amounts totaling up to $66,000. by the defendant Rebecca Tolkoff.

(c) On or about the last business day of each month and the first business day of the next month, the defendant Rebecca Tolkoff would cause the records of the Bank reflecting the amount of inter-office clearings to be inflated in amounts up to $66,000.

(Title 18, United States Code, Sections 1005 and 2)

FOREMAN

WHITNEY NORTH SEYMOUR, JR.
United States Attorney

Appendix "D"

(Findings of Facts and Conclusion of Law of the United States District Court for the Southern District of New York)

• • • • •

Therefore, I conclude as follows by way of ultimate facts and conclusions of law:

Mr. Portner knew sufficiently that there were being made false entries for purposes of concealment as well as fraud. He is specifically charged in Paragraph 4C of this first count of the indictment with concealment and being a party to a conspiracy to conceal. That conspiracy we know was successful from 1959 until June 28th of 1968.

It is perfectly true that Nathan Portner did no physical or overt act of a tangible nature between at least January of 1960, indeed, right up to the present. However, there is an episode which occurred on or about August 1, 1968 which I must make a specific finding of because it is very important in this case in my judgment. On August 1st of 1968 two FBI agents, Reese and our witness, who is now a security officer in a Newark bank, William Flynn, went to what I will call Mr. Portner's new premises in Linden, New Jersey, where he has his used car lot even today, for an interview for the express purpose of finding out whether or he is the Nathan Portner who had banking connections with the Merchant's Bank Canal Street Branch. I find that the Bureau Agents Flynn and Reese asked him specific questions and as a result of their specific questions I find that Nathan Portner told the agents that he had never done any banking business in New York. He denied ever being in any kind of automobile business in New York State. He also denied any banking connections with the Merchant Bank Canal Street Branch or any other branch or, indeed, any other New York State bank. He also

stated to the agents that he had been in business in Linden, New Jersey, for over 20 years.

This testimony, in my judgment, is very, very important for a number of reasons. First, it goes to the crucial issues of knowledge and intent. It shows that Nathan Portner knew the essential outlines of the scheme. That is to say, that he knew full well, although he may not have known the exact methods of Becky Tolkoff, that her placing these hidden checks and debiting them against other accounts had been successful and he did not want this information revealed for very obvious reasons, and therefore I find that he purposely obfuscated the investigation of the agents as a man who showed guilty knowledge of participation for all these many years and, more than that, that so far as he was concerned at least he had high hopes that this scheme was still continuing.

I find in this regard, by the way, that there is no evidence whatsoever that on August 1, 1968 Nathan Portner knew that Becky Tolkoff had gone to the FBI and to her employers and told all.

Therefore, based upon these findings I conclude, though it is a very interesting and somewhat difficult legal point, that the statute of limitations does not bar this indictment. This is a case which falls within the rubric applied by Judge Kaufman, then a District Judge, when he filed his opinion in the well known case of United States versus Bonnano. Admittedly the facts there are different from the facts here, but the distinction which he was trying to draw I believe is a sound one and I believe should be applied here. It would be quite a different thing if we had a case where the indictment did not charge Mr. Portner and others with having a scheme, one of the principal artifacts and purposes of which was continued concealment

of the falsifications which, of course, we know were the idea, standing alone by themselves and in their details, of Becky Tolkoff.

From what I have already found and concluded there will be some indication at least of why I ruled this morning that there is no virtue of a legal nature to the defenses of double jeopardy and collateral estoppel. The facts here, the proof on which the facts have been found by the Court, are entirely different from the facts which were before Judge Murphy in the case involving Mr. Frank Farinaro, the messenger Pablo Garcia and that particular $6,000 check. Even though I did allow counsel to go into that episode here, it was for the purpose of enlarging the record on the defense which was raised of collateral estoppel and double jeopardy.

Obviously Mr. Nathan Portner is not being convicted here for the episode involving the so-called Pablo Garcia delivery of the note and the check and the resulting proceeds of $6,000 which Mr. Portner received. As I conclude the situation, that is a different episode.

Now, Mr. Nathan Portner, please rise.

This Court finds you guilty of Count 1 and technically all the substantive counts which I have already said as a practical matter are really one and the same, hence it will come as no surprise to you at the time of sentencing that I would never even think of anything approaching consecutive sentences. As I see it, this is all one ball of wax. I'm ordering a presentence report on you. I'm putting this matter down for sentence on June 25, 1971 at 2:15 o'clock in this room.

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Appendix "E"

(District Court Judgment)

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

No. 70 Cr. 597

UNITED STATES OF AMERICA

v.

NATHAN PORTNER

On this 25th day of June, 1971, came the attorney for the government and the defendant appeared in person, and by Henry K. Chapman, Esq.,

IT IS ADJUDGED that the defendant upon his plea of not guilty and a finding of guilty by the Court, defendant having waived trial by jury, has been convicted of the offense of unlawfully, wilfully and knowingly, with intent to defraud a bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, making and causing to be made false entries in books, reports and statements of said bank. (Title 18, U.S. Code, Section 1005 and 2.); conspiracy so to do. (Title 18, U.S. Code, Section 371). as charged in counts 1 thru 71 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

Appendix "E"

IT IS ADJUDGED that the defendant is sentenced to Five (5) Years on count 1. Execution of prison sentence is suspended. Defendant is placed on probation for a period of Five (5) Years, subject to the standing probation order of this Court. Special condition of probation being that the defendant make restitution in an amount not to exceed $10,000.00 on a schedule to be agreed upon by the Probation Officer during defendant's period of probation. Imposition of sentence on counts 2 thru 71, inclusive, is suspended. Defendant is placed on probation for a period of Five (5) Years, to run concurrently with the probation imposed on count 1, subject to the standing probation order of this Court.

IT IS FURTHER ORDERED that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

IT IS FURTHER ORDERED that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

United States District Judge.
/s/ JOHN LIVINGSTON
Clerk.

Appendix "F"

(Opinion by Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 264—September Term, 1971.

(Argued November 3, 1971 Decided June 22, 1972.)

Docket No. 71-1826

UNITED STATES OF AMERICA,

Appellee,

—v.—

NATHAN PORTNER,

Defendant-Appellant.

Before:

WATERMAN, SMITH and TIMBERS,

Circuit Judges.

Appellant, convicted and sentenced below for having conspired with two bank employees to misapply funds of, and to make false entries in the books of, Merchants Bank of New York, appeals from judgment of conviction, United States District Court for the Southern District of New York, Tyler, *J.*, without jury, on the sole ground that his prosecution was barred by the Statute of Limitations, 18 U.S.C. §3282.

Conviction affirmed.

Appendix "F"

HOWARD WILSON, PETER F. RIENT, Asst. United States Attorneys, WHITNEY NORTH SEYMOUR, JR., United States Attorney, *for Appellee.*

HENRY K. CHAPMAN, New York City, *for Appellant.*

WATERMAN, *Circuit Judge:*

The appellant, Nathan Portner, was indicted on July 23, 1970, along with two employees of the Merchants Bank of New York, Rebecca Tolkoff and Joseph Calabro, for conspiracy willfully to misapply monies of the bank and to make false entries in the bank's books with intent to injure and defraud the bank and to deceive its officers, in violation of 18 U.S.C. §§ 371, 656, and 1005. The conspiracy was alleged to have existed continuously from August 1959 to June 1968. In addition to the conspiracy count, there were 70 additional substantive counts in the indictment, charging that the three co-defendants regularly made false entries in the bank's records on the last banking day of each month and on the succeeding first banking day of the next month from July 30, 1965 to June 3, 1968, in violation of 18 U.S.C. §§ 1005 and 2. These substantive counts were also listed as overt acts done in furtherance of the conspiracy charged in the conspiracy count. At the conclusion of a three day trial before Judge Tyler, sitting without jury in the United States District Court for the Southern District of New York, the judge was satisfied that the Government had proved beyond a reasonable doubt the guilt of appellant on all of the counts and, from the bench,

in a lengthy statement orally gave his substantiating findings and his conclusions of law thereon.[1]

The single issue before us is whether the court below erred in refusing to hold that prosecution of Portner was barred by the five-year period of limitation provided for by 18 U.S.C. § 3282. The pertinent facts relating to this issue are detailed below. We affirm the conviction.

The defendant in 1959 was doing business with the Merchants Bank of New York under the name of Car Buyers. Sometime in May of that year Portner telephoned the head bookkeeper at the Canal Street office of the bank, Rebecca Tolkoff, in order to find out which of his checks had been cashed. This was the first of several telephone calls of a similar nature. By early July Miss Tolkoff was sufficiently acquainted with Portner's account so that she agreed with him to honor for payment a few of his checks when presented despite the fact that he had insufficient funds on deposit for them to be paid in ordinary course.

In order to further their conspiratorial scheme the unpaid sums of these checks written by Portner on the Car Buyers account were falsely charged against other unrelated accounts, accounts which always had relatively large balances of around six figures month by month. Within a week after Portner and Tolkoff had entered into their agreement Tolkoff had set aside checks totaling $26,000 drawn on the Car Buyers account before any charges or debits were made against that account.

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[1] Appellant was sentenced to a prison term of five years on Count 1, the conspiracy count, but was placed on probation for the five year period. A special condition of the probation is that appellant make restitution in an amount not to exceed $10,000. Imposition of sentence on Counts 2 through 71 was suspended and appellant was placed on probation for the same five year period as imposed on Count 1.

Portner, however, was in tough financial straits and, despite repeated reassurances to Miss Tolkoff that he would deposit sufficient funds to pay his overdrafts he did not bring in any money to cover the improperly paid checks. After the scheme had been in operation for a couple of weeks Tolkoff was nervous enough about the situation to consult with her superior, Joseph Calabro, on the matter.

Calabro, who was the head bookkeeper for the entire Merchants Bank, then called Portner and received basically the same assurances that Portner had been giving Becky Tolkoff. So convinced was Calabro that Portner would ultimately make his bad checks good that Calabro, himself, collaborated with Tolkoff and Portner and later agreed to the payment of an additional $12,500 worth of Car Buyers checks by debiting other customer accounts, which was done by charging a large account at the start of each month with the full amount of the shortage and at the end of month that shortage would be removed before the account received its monthly statement, and for the period of a day or two at the end of each month the shortage would not be discovered because of inter-branch transfer of accounts. This method, begun in 1959, was continued until mid-1968.

In August 1959 the Car Buyers account was closed out, a new account was opened and other arrangements were made, but the upshot of it all was that by November 1959 the amount of misapplied monies had increased to $66,000 and the anxiety of the bookkeeper confederates had been increasing at a similar pace. During the intervening period Portner was contacted several times, was exhorted to make good on his withheld checks, and was always ready with a promise of payment. Moreover, during this time Portner was aware that Tolkoff was making

false entries in the bank's books in order to conceal the payments of the fraudulent drafts. Appellant's apparently convincing reassurances continued to be made until the end of 1959 when he disappeared. In 1968 he was found operating an automobile business in New Jersey, was interviewed by FBI agents and denied having had any banking connections with the Merchants Bank.

Appellant's contention is that he only conspired with his co-conspirators to misapply the bank funds and that this conspiracy, or any conspiracy to which he was a party, was completed by November 1959 when the last of his worthless checks was set aside. He claims that the false entires in the bank's records made after November 1959 were made by the bank employees, Tolkoff and Calabro, solely on their own initiative for the purpose of concealing their criminal misapplication of the bank's funds. If we were to accept this view of the agreement the co-conspirators agreed to in 1959, the prosecution of Portner would be clearly barred by 18 U.S.C. Section 3282, for, in *Grunewald* v. *United States*, 353 U.S. 391, 405 (1957) the Supreme Court ruled that "acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy and acts of concealment done after these central objectives have been attained for the purpose only of covering up after the crime" are quite different in their legal consequences and the latter may not be used to lengthen the period of the duration of the conspiracy for the purpose of causing the prosecution to have been brought prior to the expiration of the date set by the statute of limitations. It is the Government's position that the conspiracy was not, in fact, so limited, and that the acts of concealment here were done in furtherance of the main criminal objectives of the conspiracy

contemplated at the time it was entered into. The trial court so found and an analysis of the evidence fully sustains such a finding.

Indeed, on this record, it must be concluded that Portner did not, as he would have us believe, enter into any conspiracy with his co-conspirators that ended when he disappeared. The object of this conspiracy was not to rob the bank or its depositors and then to run with the fruits of the robbery. All the parties to this conspiracy understood when they mutually agreed to enter into it in 1959 that its only objective was to misapply funds for Portner's benefit so as to take care of his then worthless checks; and then to continue to conceal the misapplication until such time as Portner fulfilled his promises to his co-conspirators, made his checks good, and cleaned up his overdrafts.

From the inception of the conspiracy, from early 1959 before Portner disappeared until June 1968 when Miss Tolkoff disclosed to bank authorities what she had been doing the two bank employees made precisely the same acts in furtherance of the objects of the conspiracy; the records were falsified in no different manner after 1959 from the method used during that year.

Most assuredly it defies common sense to believe that Tolkoff and Calabro would have ever entered into their arrangement with Portner to honor clandestinely Portner's bad checks without an understanding by Portner that he would make the checks good. Thus, in this case, as in *United States* v. *Hickey*, 360 F.2d 127, 141 (7 Cir.), *cert. denied*, 385 U.S. 928 (1966), the conspiracy necessarily encompassed the clandestine repayment of the misapplied funds.

Clearly the concealment of the misapplication of funds through the making by Tolkoff and Calabro of false entries

in the bank's records was in furtherance of a continuing conspiracy. Indeed, it was crucial to the success of the conspiracy for, without such concealment, the misapplied funds would have been quickly discovered by the bank authorities long before the object of clandestine repayment could have been achieved. As was found by the court below, Portner knew that a main criminal object of the conspiracy was to conceal the wrongful processing of his worthless checks, and there was ample evidence to support the finding that Portner was aware that this concealment was being accomplished by the making of false entries in the records of the bank. Pursuant to the object of the conspiracy which the parties entered into in 1959 the bank's records continued to be falsified until 1968. We therefore conclude that the last overt act in furtherance of the conspiracy into which the appellant entered in 1959 took place in 1968. We agree with the trial judge that the statute of limitations did not bar prosecution of appellant.

Conviction affirmed.

Appendix "G"

(Court of Appeals Judgment)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

As a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of June, one thousand nine hundred and seventy-two.

Present:

HON. STERRY R. WATERMAN,
HON. J. JOSEPH SMITH,
HON. WILLIAM H. TIMBERS,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NATHAN PORTNER, *et al.*,

Defendants,

NATHAN PORTNER,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Appendix "G"

This cause came to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

/s/ A. DANIEL FUSARO
Clerk

Appendix "H"

(Order Extending Time to File)

SUPREME COURT OF THE UNITED STATES

No. A-96

NATHAN PORTNER,

Petitioner,

v.

UNITED STATES.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 21, 1972.

/s/ WARREN E. BURGER
Associate Justice of the Supreme Court of the United States

Dated this 26th
day of July, 1972

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement	2
Argument	6
Conclusion	11

CITATIONS

Cases:

Benton v. *Maryland*, 395 U.S. 784	10
California v. *Taylor*, 353 U.S. 553	9
Fiswick v. *United States*, 329 U.S. 211	10
Grunewald v. *United States*, 353 U.S. 391	6, 7
Hirabayashi v. *United States*, 320 U.S. 81	10
Husty v. *United States*, 282 U.S. 694	9
Hyde v. *United States*, 225 U.S. 347	8, 9
Krulewitch v. *United States*, 336 U.S. 440	7
Lawn v. *United States*, 355 U.S. 339	9
Lutwak v. *United States*, 344 U.S. 604	7
Neely v. *Eby Construction Co.*, 386 U.S. 317	9
Pinkerton v. *United States*, 328 U.S. 640	8, 9, 10
Poliafico v. *United States*, 237 F. 2d 97, certiorari denied, 352 U.S. 1025	9
Toussie v. *United States*, 397 U.S. 112	8
United States v. *Agueci*, 310 F. 2d 817, certiorari denied, 372 U.S. 959	9

Cases—Continued

	Page
United States v. *Borelli*, 336 F. 2d 376, certiorari denied *sub nom. Cinquegrano* v. *United States*, 379 U.S. 960	9
United States v. *Kissel*, 218 U.S. 601	8

Statutes:

18 U.S.C. 371	2
18 U.S.C. 656	2
18 U.S.C. 1005	2, 3, 7
18 U.S.C. 3282	6

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-297

NATHAN PORTNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21a-27a) is not yet reported. The findings of fact and conclusions of law of the district court (Pet. App. 16a-18a), made in conjunction with the court's announcement of its verdict at the jury-waived trial,[1] are not reported.

[1] The court characterized its findings, as reproduced in the appendix to the petition, as its findings of the "ultimate" facts. Immediately prior to the court's statement as excerpted in the appendix, the court had summarized the facts in substantially greater detail. See pp. 484-499 of the trial transcript, a copy of which is being lodged herewith. The transcript is hereinafter referred to as "Tr."

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1972 (Pet. App. 28a-29a). On July 26, 1972, the Chief Justice extended the time for filing a petition for a writ of certiorari until August 21, 1972 (Pet. App. 30a), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's prosecution for conspiracy to misapply bank funds and falsify the bank's books was properly held not barred by the statute of limitations where, though the last misapplication of funds occurred more than five years before the return of the indictment, the last falsification of the bank's books (designed to conceal the misapplications until they could be corrected) occurred within the five-year statutory period.

STATEMENT

After a non-jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on all counts of a 71-count indictment charging that he and two codefendants conspired to misapply funds of a federally insured bank and to make false entries in the bank's books with intent to defraud the bank and deceive its officers (18 U.S.C. 371, 656, 1005) (Count One) and that they in fact made such false entries (18 U.S.C.

1005) (Counts Two through Seventy-One) (Pet. App. 10a-15a, 18a).[2] On June 25, 1971, petitioner was sentenced to five years' imprisonment on Count One; execution of the sentence was suspended and he was placed on probation for five years on condition that he make restitution in an amount not to exceed $10,000. Imposition of sentence on the substantive counts was suspended and petitioner was placed on probation as to them for five years, to run concurrently with the probationary period prescribed as to Count One (Pet. App. 19a-20a). The court of appeals affirmed (Pet. App. 21a-29a).

In May 1959, codefendant Rebecca Tolkoff, the head bookkeeper of a branch office of Merchants Bank of New York, agreed with petitioner to honor certain checks drawn on his account though the funds in the account were insufficient to pay the checks in ordinary course. She did so in reliance on a promise by petitioner to deposit sufficient funds in his account within a few days to cover the checks. Miss Tolkoff charged the checks, when presented, against accounts of other depositors in which large balances were customarily maintained from month to month. Within a week of the agreement, checks of petitioner in the amount of $26,000 had been falsely processed by Tolkoff in this manner (Pet. App. 23a; Tr. 26-35).

When petitioner failed to make covering deposits as he had promised, Tolkoff pointed out to him that

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[2] The codefendants, Rebecca Tolkoff and Joseph Calabro, pleaded guilty and testified for the government against petitioner.

she was "hiding" his checks and that she was concerned because she never knew when an audit would occur. Petitioner told her that he would soon make a covering deposit. After the scheme had been in operation two weeks, Tolkoff told her superior, codefendant Joseph Calabro, about the situation. Calabro, the head bookkeeper for the entire bank, called petitioner and directed his attention to the fact that Tolkoff was finding it constantly necessary to cover up the misapplication of funds by "fixing figures" and making adjustments in the bank's books. Petitioner told Calabro that a covering deposit would be made shortly and that there was no cause for concern (Pet. App. 24a; Tr. 35-37, 173-176).

Convinced that petitioner would ultimately make good on his checks, Calabro joined in the arrangement. Later he agreed to the honoring of an additional $12,500 worth of insufficient-funds checks of petitioner and to concealment of the improper payments through the same device of falsely debiting other customers' accounts. At the beginning of each month, Tolkoff charged a large account with the full amount of the shortage. Then, at the end of the month, before the monthly statement for the account was made up, she credited the account in the amount it had been debited, thus restoring the proper balance as to it. For a period of a day or two at the end of each month the shortage resulting from the misappropriations of funds was undiscoverable because of inter-branch transfers of accounts (Pet. App. 24a; Tr. 71-75).

By November 1959, as the result of additional mispayments similar to those mentioned, the amount of

the shortage had increased to $66,000. In that month, petitioner and the two bookkeeper confederates met at a restaurant where petitioner, in addition to renewing his pledge to make good on his checks, signed a hand-printed statement acknowledging that he was responsible for the shortage (Pet. App. 24a; Tr. 60-67, 159-165, 186-189, 223-232). In the interim, petitioner had been contacted several times by Tolkoff and Calabro and urged to correct the shortage with a deposit. Though he continued to promise that he would, the funds were never forthcoming. Petitioner was aware throughout the period that Tolkoff was falsifying the bank's books to conceal the payment of his fraudulent drafts. Around the end of 1959 or the beginning of 1960 he disappeared (Pet. App. 24a-25a; Tr. 69-71, 190-191).

Miss Tolkoff's falsifications of the bank's books, begun in 1959, continued until June 1968, when, as the result of a decision by the bank to institute computer accounting, she confessed to the bank's officers what she had been doing (Pet. App. 24a; Tr. 142-149).[3] From 1961 to 1963 petitioner was incarcerated in a New York prison on an unrelated state charge (Tr. 433-435, 446-448; Pet. 10). On August 1, 1968, petitioner, who had in the meantime been discovered operating an automobile business in New Jersey, denied

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[3] The 70 substantive counts of the indictment charged falsifications covering the period from July 1965 to June 1968 (Pet. App. 12a-15a). The same falsifications were also charged as overt acts in furtherance of the conspiracy (Pet. App. 12a-14a).

in an interview with two F.B.I. agents that he had ever had any banking connections with Merchants Bank (Pet. App. 25a; Tr. 286-289).

The indictment was returned July 23, 1970, ten and a half years after the last misapplication of funds resulting from the fraudulent honoring of petitioner's checks, but within 26 months of the last falsification of the bank's books by Miss Tolkoff.

ARGUMENT

1. Petitioner contends, on alternative grounds, that his prosecution on the conspiracy count was barred by the five-year statute of limitations (18 U.S.C. 3282) (Pet. 12-20, 21-22, 26).

a. His principal argument—the only one urged in the court of appeals—is that the only conspiracy to which he was a party was one to misapply the bank's funds and that this conspiracy terminated by November 1959, when the last of his worthless checks was paid without charging his account. He contends that the subsequent false entries in the bank's books were made by the bookkeeper confederates, solely on their own initiative, for the purpose of concealing their criminal misapplication of the bank's moneys; thus, he says, those acts of concealment did not extend the life of the conspiracy for limitations purposes. The argument, which relies on *Grunewald* v. *United States*, 353 U.S. 391,[4] is answered by the

[4] *Grunewald*'s relevant holding was that the duration of a conspiracy cannot be lengthened indefinitely for purposes of the statute of limitations merely because the conspiracy is

opinion of the court of appeals (Pet. App. 25a-27a), on which we rely. We merely note, in addition, that *Grunewald* recognized that "a vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime" (353 U.S. at 405; emphasis in original). Here the acts of concealment—the falsifications of the bank's books—were manifestly done in furtherance of the main criminal objectives of the conspiracy; they were, indeed, an essential and constituent part of those objectives. Specifically defined as crimes by 18 U.S.C. 1005, the falsifications were charged in the indictment to be aims of the conspiracy, and the evidence showed that they were central to the scheme by which petitioner was able to have his worthless checks honored by the use of accounting tricks that concealed the misappropriations indefinitely. Hence petitioner's statement that "the principal aim" of the conspiracy was to obtain money without maintaining a sufficient balance in an account (Pet. 18) is too narrow. While that may have been petitioner's aim, the core of the conspiracy was the fraudulent covering of petitioner's checks until petitioner could deposit the funds to make good on

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kept secret and the conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purposes have been accomplished (353 U.S. at 399-406). Cf. *Krulewitch* v. *United States*, 336 U.S. 440, 443-444; *Lutwak* v. *United States*, 344 U.S. 604, 615-617.

them. Central to this purpose was the prevention of discovery of the misapplication of the bank's moneys by criminal falsification of the bank's records until such time as petitioner made up the deficiencies.[8]

b. While petitioner was imprisoned from 1961 to 1963 on the unrelated state charge, he assertedly wrote letters to Merchants Bank and to the New York State Banking Department requesting copies of his bank statements for a portion of the relevant period (Pet. 11; Tr. 434, 446-447). His alternative contention based on the statute of limitations is that even if the conspiracy be deemed to have continued beyond 1959, when the last misapplication of funds occurred, he withdrew from it when, in 1961, he went to prison, or at the latest when he wrote the letters, so that in

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[8] Petitioner's contention that the decision below fails to give recognition to a concession by the prosecutor that the statute of limitations had run against one of the charges (Pet. 22; cf. Pet. 6) misstates what the prosecutor conceded. Referring to paragraph 4(a) of the conspiracy count (Pet. App. 11a), in which the payment of petitioner's checks without charging his account was mentioned as one of the "means by which the defendants would carry out the said conspiracy," the prosecutor stated in colloquy that it was conceded by the government that "4(a) * * * is barred" (Tr. 358). The prosecutor's obvious meaning was that a substantive charge based on the misapplication of funds would have been barred by limitations. The indictment in fact did not contain such a charge.

Toussie v. *United States*, 397 U.S. 112, cited by petitioner (Pet. 12-13, 15-16), is not germane. Unlike the offense involved in *Toussie*—failure to register for the draft—conspiracy is, by its nature, ordinarily a continuing offense. Cf. *Pinkerton* v. *United States*, 328 U.S. 640, 646; *Hyde* v. *United States*, 225 U.S. 347, 369-370; *United States* v. *Kissel*, 218 U.S. 601, 607-608.

either case his prosecution was barred (Pet. 21-22). This contention, however, was not made in the court of appeals; there is consequently no occasion for this Court to consider it.[6] The argument in any event has no merit. Incarceration, without more, does not suffice to effect withdrawal from a conspiracy.[7] Nor was the writing of the letters relevant. Withdrawal from a conspiracy requires affirmative action disavowing or defeating its objectives. *Hyde* v. *United States*, 225 U.S. 347, 369; *Pinkerton* v. *United States*, 328 U.S. 640, 646. Petitioner's mere act of requesting copies of his bank statements, without disclosure of or allusion to any of the pertinent conspiratorial events, was not the sort of affirmative action that is required to effect withdrawal from a conspiracy. Cf. *United States* v. *Borelli*, 336 F. 2d 376, 388 (C.A. 2), certiorari denied *sub nom. Cinquegrano* v. *United States*, 379 U.S. 960.

2. Petitioner's other contentions need not be considered because they, like the alternative limitations argument, were not made in the court of appeals. They are in any event similarly insubstantial.

a. Petitioner contends that it was error to convict him on the substantive counts, in which all three

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[6] *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 330; *Lawn* v. *United States*, 355 U.S. 339, 362-363 n. 16; *California* v. *Taylor*, 353 U.S. 553, 557 n. 2; *Husty* v. *United States*, 282 U.S. 694, 701-702.

[7] *Pinkerton* v. *United States*, 328 U.S. 640, 646; *United States* v. *Borelli*, 336 F. 2d 376, 389 (C.A. 2), certiorari denied *sub nom. Cinquegrano* v. *United States*, 379 U.S. 960; *United States* v. *Agueci*, 310 F. 2d 817, 838-839 (C.A. 2), certiorari denied, 372 U.S. 959; *Poliafico* v. *United States*, 237 F. 2d 97, 106 (C.A. 6), certiorari denied, 352 U.S. 1025.

confederates were charged with making false entries in the bank's books during the last three years of the conspiracy (Pet. App. 12a-15a), because there was no evidence that he made any of the entries (Pet. 20-21). The falsifications were, however, made pursuant to the conspiracy by one of its members, Miss Tolkoff. They were therefore chargeable to the other members as well. *Pinkerton* v. *United States*, *supra*, 328 U.S. at 645-648; cf. *Fiswick* v. *United States*, 329 U.S. 211, 217.[8]

b. A 1961 indictment naming petitioner as an accused, involving similar charges, the same bank, and roughly the same time period as that involved in the active phase of petitioner's participation in this case (the latter months of 1959), but different codefendants, different checks, and different false entries, was dismissed in 1965 on motion, after the prosecution had presented its evidence, for failure by the government to make out a *prima facie* case (Pet. 10-11; Pet. App. 2a-9a). The district court in this case rejected a defense plea of double jeopardy based on the prior proceeding. While petitioner apparently does not challenge that ruling (cf. Pet. 23), he suggests that if the investigation which led to the earlier indictment had been more efficient it would have more fully revealed the extent of the disorders at the bank,

[8] Moreover, since imposition of sentence on the substantive counts was suspended and petitioner was placed on probation as to them for the same five-year probationary period prescribed for the conspiracy count, the concurrent sentence rule is applicable to this contention. Cf. *Benton* v. *Maryland*, 395 U.S. 784, 791; *Hirabayashi* v. *United States*, 320 U.S. 81, 85.

including the events involved here. He asserts that he has for that reason been dealt with unfairly in being required to stand trial, twelve years after his active involvement ceased, on the generally similar charges of this case (Pet. 23-25). The answer to the contention is that, limitations considerations aside, a conspirator has no cause for complaining that carefully concealed criminal activities in which he collaborated were not discovered by the authorities sooner.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

PHILIP R. MONAHAN,
Attorney.

SEPTEMBER 1972.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 477121 182

INDEX

Page

STATEMENT 1

ARGUMENTS:

Mere Acts of Concealment of a Conspiracy After Accomplishment of the Central Objectives, Does Not Toll the Statute of Limitations. 2

A. The Main Objective of the Conspiracy Was Obtaining Funds Fraudulently and Petitioner Took No Action Once This Was Accomplished. 3

B. The Activities of the Co-Conspirators Following Petitioner's Disappearance Were Mere Acts of Concealment. 4

C. Petitioner is Amply Protected by *Grunewald* Since He Played No Part in the Concealment. 5

CONCLUSION 7

TABLE OF AUTHORITIES:

Grunewald v. United States, 353 U.S. 391. ..2, 3, 5, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-297

NATHAN PORTNER, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF ON THE PETITION

STATEMENT

It is not Petitioner's purpose, in submitting this reply brief, to subject the Court to a reargument of the propositions already fully stated in the Petition. The function of this brief is to reiterate the need to amply protect Petitioner's statutory rights, while at the same time, to point out in the briefest manner possible certain fallacies in Respondent's argument.

ARGUMENT

MERE ACTS OF CONCEALMENT OF A CONSPIRACY AFTER ACCOMPLISHMENT OF THE CENTRAL OBJECTIVE, DOES NOT TOLL THE STATUTE OF LIMITATIONS

Although the United States, Respondent, readily admits in its Statement that Petitioner separated himself from the conspiracy in late 1959-early 1960, and remained so separated thereafter, it construes, as did the Court of Appeals, Petitioner's activities after 1960 through the 1968 F.B.I. interview as "acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy" (Brief in Opposition, p. 7, citing *Grunewald* v. *United States,* 353 U.S. 391 at 405; emphasis the Court's). In so doing Respondent seeks to so broaden *Grunewald* as to make its protection of the statute of limitation rights meaningless. As urged in the Petition, the Court should review the judgment below with a mind to either placing the instant set of facts within the applicable standards of its existing decision in *Grunewald* or to reexamine and possibly extend *Grunewald.*

Respondent admits that "Grunewald's relevant holding was that the duration of a conspiracy cannot be lengthened indefinitely for purposes of the statute of limitation merely because the conspiracy is kept secret and the conspirators take steps to bury their traces in order to avoid detection and punishment after the central criminal purposes have been accomplished" (Brief in opposition, p. 6-7, n. 4, citing, 352 U.S. at 399-406). However, Respondent joins the courts below in misconstruing the very words of the *Grunewald* holding when applying them to the instant case. Where *Grunewald* calls for continued livelihood of the time within which indictment can be had when "acts of

concealment [are] done in furtherance of the *main* criminal objectives of the conspiracy" (353 U.S. at 405), it would not leave open that time when "acts of concealment [are] done after these central objectives have been attained, for the purpose only of covering up after the crime" (supra). What more perfect set of circumstances than in the instant case for application of *Grunewald*.

A. The Main Objective of the Conspiracy Was Obtaining Funds Fraudulently and Petitioner Took No Action Once This Was Accomplished

For the purpose of argument, let the Court assume that Petitioner admits he fraudulently obtained funds from the bank, knowing full well that Tolkoff and Calabro were concealing the payments of his drafts. Further, let the Court suppose Petitioner was the only person to derive some benefit, material or otherwise, from the fraud perpetrated, and that Tolkoff and Calabro initially became implicated for the sole purpose of assisting a good bank customer through a rough financial period. Further assume Tolkoff and Calabro had absolutely no criminal intent at any point while dealing with Petitioner.

Petitioner disappeared sometime in early 1960.

Tolkoff and Calabro continued to conceal the shortages until 1968.

Petitioner had as his aim the purpose of obtaining money to tide him and his business over during a bad period. As both parties admit, Petitioner's luck ran out and he was tried, convicted and jailed on an unrelated state charge in 1961.

The "*main* criminal objectives of the conspiracy" by all rationale ended at that point. Quite frankly, it is obvious that Petitioner had no idea what his situation with the Merchants Bank was. He wrote letters while in prison to attempt to find out what his situation was. Admittedly, he stood to benefit from the activities of Tolkoff and Calabro in continuing to conceal the shortage. Inasmuch as it was not being prosecuted, *however,* the "main criminal objective" of obtaining funds had ceased. The "acts of concealment [on the part of Tolkoff and Calabro] done after these central objectives [were] attained, [were obviously] for the purpose only of covering up after the crime."

B. The Activities of the Co-Conspirators Following Petitioner's Disappearance Were Mere Acts of Concealment

The activities of Tolkoff and Calabro, after Petitioner's disappearance, were purely to protect themselves, and in line with *Grunewald,* "acts of concealment done after their central objectives have been attained, for the purpose only of covering up after the crime." To construe the activities of Tolkoff and Calabro as central to Petitioner's early activities, and to suppose, as Respondent does, that Tolkoff and Calabro really imagined that Petitioner would reappear after almost eight years to "deposit the funds to make good on [the checks]" (Brief in Opposition, pp. 7-8), is beyond the realm of human predictability.

It does not take too much imagination to envision the scenario after Petitioner disappeared: Talkoff calls Calabro reporting Petitioner's disappearance; they must protect *themselves* by continuing to cover up the shortage while looking for a way out. Petitioner would not attempt here to sketch the invective feeling

he created towards himself with Tolkoff and Calabro when he disappeared, but leaves it to the Court to imagine.

Certainly, just as the courts below, the Respondent fails to see that the acts of Tolkoff and Calabro after Petitioner's disappearance are squarely within *Gruenwald,* as they were "acts . . . for the purpose only of covering up after the crime."

As Respondent so clearly points out in its Brief, "the falsifications were charged in the indictment to be aims of the conspiracy, and the evidence showed that they were central to the scheme by which Petitioner was able to have his worthless checks honored by the use of accounting tricks." (Brief in Opposition, p. 7) Petitioner reached a point in 1959 where he cashed his last check and disappeared.

It may well be true that the falsifications were part and parcel of the active conspiracy and made the honoring of the worthless checks possible during the period of Petitioner's activities; however, when his activities ceased, the falsifications had nothing to do with assisting Petitioner cash checks.

C. Petitioner Is Amply Protected by Grunewald Since He Played No Part in the Concealment

Respondent contends that "the acts of concealment—the falsifications of the bank's books—were manifestly done in furtherance of the *main* criminal objectives of the conspiracy" (Respondent's Brief at p. 7). As previously discussed, Petitioner takes pointed issue with this. The bare facts show that Petitioner had absolutely no knowledge of what Tolkoff and Calabro were doing from the time he went to jail on the unrelated state charge. He assisted them in

no manner in their efforts to conceal the misuse of funds by falsifying the bank's records. As discussed, these activities were mere concealment, as the *main* objective was complete with the last receipt of funds.

The Government appears to want Petitioner to "carry a sign" disavowing the conspiracy. What value is a statute of limitations? Petitioner committed a crime, he fraudulently obtained funds in 1959. For him to receive the benefits of the statute of limitations, Respondent would have him publicly admit the crime in order that the statute might begin to run. Petitioner waved a red flag in front of the Merchants Bank and the New York State Banking Department when he wrote the letters while in jail. Respondent's narrow view of affirmative action is unrealistic. The *main* objective was finished.

Assuming, arguendo, that Petitioner's activity in denying to the F.B.I. in 1968, that he ever had any banking connections with Merchants Bank, is concealment; it certainly is the type of concealment "for the purpose only of covering up after the crime," which *Grunewald* stands for.

"*Grunewald's* relevant holding was that the duration of a conspiracy cannot be lengthened indefinitely for purposes of the statute of limitation merely because the conspiracy is kept secret and the conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purposes have been accomplished" (Brief in Opposition, pp. 6-7, n.4, citing, 353 U.S. at 399-406). The Respondent has misconstrued this holding and Petitioner has come before the Court to question whether the very purpose of the statute of limitations (18 U.S.C. 3282) is not

defeated and nullified by the interpretation given by the courts below, and Respondent, and applied to this case concerning the conspiracy statute (18 U.S.C. 371) (Petition, p. 4, Questions 12).

CONCLUSION

For the reasons stated and arguments presented herein, and in the petition, a writ of certiorari should be granted.

Respectfully submitted,

HOWARD FRANKLIN CERNY
Attorney for Petitioner
345 Park Avenue
New York, New York 10022
(212 688-9700

HOWARD F. CERNY
JOHN J. MEGLIO
RICHARD SILVER
Of Counsel

October 19, 1972